In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents seek to uphold the court of appeals' rulings that various alleged errors in the trial court's charge denied them a fair trial by focusing on particular words and phrases whose meaning and significance they view in isolation without considering either the charge in its entirety or the total picture of the lengthy trial—the same error that the court of appeals committed in reversing the convictions.

a. For example, respondents point to the instruction that the jury had heard each of the principal officers of the three defendant companies

> deny in broad terms that there was any understanding or agreement among them, either ex-

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> press or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. * * * [5000a]

Treating the words "in broad terms" as meaning "generally," they argue that, contrary to the court's statement, their officers did not merely make general denials that they had entered into such agreements or understandings, but explicitly and in detail gave all the facts surrounding the meetings and agreements and, with equal detail and specificity, denied the existence of agreements or understandings.

In light of the extensive testimony in which the respondents' officers had denied having any agreements or understandings, the trial court's words "in broad terms" were intended to, and did, convey to the jury the point that those denials were extremely comprehensive.

The respondents' officers had given two types of testimony: an explanation of the business reasons for their decisions, and also denials that those decisions were the result of an agreement or understanding. Many of these denials were no more than a negative answer to a question tracking the language of the indictment.[1] The trial court's instructions

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[1] Thus, the cross-examination of McKeen, Pfizer's President, by Pfizer's counsel (2734a–2735a) contained this passage:

> Q. Now, Mr. McKeen, I have some final questions I want to ask you, and as to these there is no time limit, you can come from the beginning of time down to today.
>
> To your knowledge, or according to your information, was there ever any agreement or understanding of any

treated these two types of testimony separately. With respect to the "explanatory" testimony, the court pointed out in its opinion denying a new trial (6462a, 281 F. Supp. at 848):

> The court's instructions contained repeated reminders that the actions taken by the defendants were entirely lawful if taken independently; that the jury was to consider whether the evidence reflected only normal, independent, self-interested, and lawful business conduct, or unlawful conspiratorial action; and that the essential and pervasive question was whether the government's charge of conspiracy had been proved (Tr. 6197, 6200–01, 6202–03,

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kind among Pfizer and/or Cyanamid and/or Bristol and/or Squibb and/or Upjohn that the manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol? A. Absolutely not.

Q. Was there any such agreement or understanding with any of those parties that the sale of tetracycline, of tetracycline products, be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb? A. None whatsoever.

Q. Was there any agreement or understanding of any kind with any of those parties that the sale of bulk tetracycline be confined to Bristol and the bulk tetracycline be sold by Bristol only to Upjohn and Squibb? A. None what—no, absolutely not.

Q. Was there any such agreement with any of those parties that the sale of broad spectrum antibiotics by the defendant companies and the so-called co-conspirator companies be at substantially identical and non-competitive prices? A. No, absolutely not.

See also 2365a–2366a, 2373a, 2374a–2375a, 2428a–2429a, 2562a–2564a, 2758a–2759a, 2774a–2775a, 2850a–2851a, 3081a–3082a, 3846a–3847a.

6206–07, 6208–09, 6212–14, 6221–22, 6223–24, 6225–26, 6227, 6231–32, 6245–46, 6250, 6251, 6256–57, 6258–59, 6260, 6261, 6263, 6265, 6266–67, 6269, 6284). These references had the obvious purpose of reminding the jury of the detailed accounts and explanations given by defendants' officers concerning the events in question. * * *

The court also charged that "In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you have heard legitimate business purposes for them * * *" (5000a).

The jury also had to be instructed on how to appraise the officers' denials of agreement. On this point the district court stressed (5000a-5001a), as this Court's decisions require, "that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter." See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 195; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *General Motors Corp.*, 384 U.S. 127, 141–142.

Respondents argue that the latter instruction invited the jury to decide the legal question of what constitutes an agreement under the Sherman Act. That issue was not left for the jury to determine—the court instructed in detail on the meaning of conspiracy and agreement (4950a–4953a). The jury was

required only to evaluate the credibility of the witnesses' testimony denying agreement against the witnesses' possible misapprehension of the nature of agreement or understanding as used in the allegations they were asked by their counsel to deny. As the trial court observed, in a circumstantial case such as this, such denials involve more than "a mere question of 'fact' to be decided by a simple minded judgment as to whether a witness 'lied' when he proclaimed innocence" (6465a, 281 F. Supp. 837, 850).

b. Another example of the respondents' failure to evaluate the charge in context is Bristol's argument (Br. 23–26) that the district court misinterpreted Pfizer's licenses to Squibb and Upjohn.

The indictment charged (Par. 46(i), 35a) that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline Products." The district court correctly told the jury (see *United States* v. *Krasnov*, 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam*, 355 U.S. 5) that

> There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license. [4988a–4989a.]

The court also charged (4966a) that "the government does not claim that any of the license agreements involved in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them."

Throughout the trial the witnesses and the parties had referred to the Squibb-Upjohn licenses as limited or restricted, in the sense that they did not permit these companies to manufacture or to sell in bulk. See the government's main brief, p. 78. Bristol's counsel told the jury in his summation that this "term is used in the sense that the license was not as broad as it might have been" (4740a–4741a).

Bristol contends, however, that because the court spoke of the "limitation" in the licenses "which barred [Squibb and Upjohn] from manufacturing," the jury might have been led to believe that the licenses themselves prevented those companies from manufacturing. Although the licenses in terms did not bar Squibb and Upjohn from manufacturing,[2] that was their

[2] Bristol contends (Br. 38) that Squibb and Upjohn had an implied right to manufacture if they could not obtain tetracycline any other way (see 5019a). This contention is questionable, since in the licenses Squibb and Upjohn agreed not to assist the infringement of Pfizer's tetracycline claims, for example, by buying tetracycline from unlicensed sellers (see GX 51, 8509a–8510a; GX 52, 8522a–8523a). In addition, the entire history of the transaction between Squibb, Upjohn, Bristol and Pfizer reflected that the parties obviously contemplated that Squibb and Upjohn would obtain their bulk tetracycline from Bristol pursuant to their November 1955 arrangements.

practical effect. As the district court pointed out in discussing Bristol's exception to this charge (5019a), Squibb and Upjohn "didn't get a license to manufacture * * * [a]nd they were barred from manufacturing because Pfizer had a patent and they would be infringing if they manufactured."

The court made it clear, however, that the jury was to decide whether this limitation was the result of Bristol's independent business judgment or "was an agreed objective between Bristol and Pfizer in the issuance of that license" (4989a). In light of the entire charge and the arguments of counsel, the jury could not have misunderstood that the license agreements themselves contained an illegal restriction upon manufacturing, or that they could convict except upon concluding that, apart from those licenses, the parties had an understanding that Squibb and Upjohn would not be permitted to manufacture.[8]

c. In our main brief we discussed in detail the various grounds upon which the court of appeals held the instructions defective and showed that the instructions properly and fairly explained to the jury the issues

[8] Both Cyanamid (Br. 53, fn.) and Bristol (Br. 18) state that the government implies that the Pfizer-Bristol license limited Bristol to its two "presently existing bulk customers," whereas in fact the license merely provided for the payment of royalties on sales to those customers. All the government stated (Br. 22), however—in describing the Pfizer-Bristol settlement—was that Pfizer licensed Bristol at a royalty of "3½ percent of the net sales price of tetracycline products sold by Bristol and its 'presently existing bulk customers' which Pfizer knew were Upjohn and Squibb [citations omitted]." The government does not contend that the licenses themselves limited Bristol's bulk sales to those customers; it does contend, of course, that this limitation was a term of the conspiracy.

it had to decide and the basis upon which it was to make those decisions.[4] Respondents' extensive but minute criticisms of the instructions do not refute that analysis.

2. Respondents argue at length that they had independent business reasons for maintaining identical prices (*e.g.*, Pfizer Br. 30–33; Cyanamid Br. 27–32), for failing to lower prices as market shares were lost (*e.g.*, Pfizer Br. 37), for giving misleading information to the patent office to secure patents (Pfizer Br. 19) and for the pattern of settlements and licensing among them (*e.g.*, Pfizer Br. 20–25). They made this same argument to the jury (*e.g.*, 4812a), and the jury was instructed that

> it is the government's burden to show such acquiescence and participation as a matter of conscious choice beyond a reasonable doubt. It is not sufficient to show that the parties acted uniformly or similarly or in ways that may seem to have been mutually beneficial. If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among

[4] Cyanamid states three times (Br. 11, 15, 55) that the government conceded that "genuine errors" occurred at the trial. The statement in our brief it cites, however, merely was that "in a large criminal antitrust trial * * * [i]t is almost inevitable * * * that some genuine errors will find their way into such a large and complicated record" (Govt. Br. 89). This statement was made in the "conclusion" section of the brief, in pointing out that if an appellate court searches the record in a large antitrust case to find error, the court almost inevitably will discern some respects in which it believes that particular situations could have been better handled. As its entire brief shows, the government obviously made no concession that any errors occurred.

> the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies [4952a].

The jury thus had put to it, under proper instructions, the question whether the respondent's actions were the result of individual business judgment or of agreement, and by its verdict the jury reached the latter conclusion. This result was justified by the record in this case. Despite respondents' arguments, price competition can and does exist in oligopolistic industries and the jury was warranted in concluding that the restricted structure and price uniformity that characterized this industry between 1953 and 1961 was not the result of mere economic market forces—particularly in the absence of any expert testimony supporting the respondents' thesis. Similarly, the jury was justified in deciding that the occasions on which the respondents refused either to grant licenses under the tetracycline patent or to sell tetracycline in bulk to firms other than Bristol, Squibb and Upjohn [5]—following Pfizer's widely publicized announcement that it would not license anyone except Cyanamid (2319a–2327a, 2484a–2485a; GX 48, 8475a; GX 458, 8916a–8917a)—reflected not independent business judgment but a common plan.

[5] Pfizer refused twice to grant licenses under the patent (GX 619–623, 832–835, 804; 2538a) and refused three times to sell in bulk (GX 370–373, 742; 3579a). Cyanamid refused to sell in bulk three times (GX 304, 305, 630, 631, 632; 2059a–2060a). After December 1955, when the government contended Bristol joined the conspiracy, Bristol refused twice to sell in bulk (GX 180–182; 3256a; see, also, 3257a).

Firms in such industries are subject to conflicting pressures: on the one hand to cooperate with rival sellers to maintain monopoly prices and restrict output, thereby maximizing profits for all sellers; and on the other, to increase their own share of industry profits by acting independently in setting price and output. Bain, *Industrial Organization* (2d ed.), pp. 118–120. Collusive action, which is relatively easy to arrange in markets with only a few sellers, provides a means of insuring against the likely competitive deviations from administered prices which occur in oligopoly industries. *Ibid.* Pfizer concedes (Br. 28) that a doctor concerned for the welfare of his patients would, in choosing among several interchangeable broad spectrum antibiotics, "consider differences in the cost to his patient in making his choice. For this reason no producer of broad spectrum antibiotics would wish to be undersold by a competitor." Thus, although the total sales volume of broad spectrum antibiotics might not be increased by price reductions, a reduction might increase a particular seller's share of such sales.

Under the Sherman Act, the consensual understanding necessary to establish an unlawful combination or conspiracy does not depend upon any explicit communications, meetings or agreements. This is true whether the case is criminal (*American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810) or civil (*United States* v. *General Motors*, 384 U.S. 127, 142–143; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43); acts in mutual expectation of reciprocal acts or restraints are enough (*Interstate Circuit* v. *United States*, 306 U.S. 208, 226–227; *United States* v. *Con-*

tainer Corp., 393 U.S. 333, 335; *Theatre Enterprises* v. *Paramount*, 346 U.S. 537).

The evidence justified the jury in concluding that at the time of the meetings which the government alleged marked the inception of the conspiracy between Pfizer and Cyanamid, and Bristol's subsequent entry, the parties had an understanding as to their future conduct. But the jury also might have concluded that the conspiracy was not perfected until after the specific meetings, *i.e.*, until the occurrence of a subsequent event.[6] That conclusion would have been consistent with the allegation in the indictment that the conspiracy consisted of a continuing agreement and concert of action (¶45, 33a). See *United States* v. *Houlihan*, 332 F. 2d 8 (C.A. 2), certiorari denied, 379 U.S. 828; *United States* v. *Postma*, 242 F. 2d 488 (C.A. 2). As the court of appeals recognized in its opinion on rehearing (12618a; 437 F. 2d 957, 958), it was unnecessary for the government to prove express agreements among the respondents to establish an illegal conspiracy in violation of the Sherman Act.

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[6] For example, the jury might have believed that the understanding between Pfizer and Cyanamid did not occur until the price of the bulk tetracycline Cyanamid sold to Pfizer was finally settled on the basis on the industry's rule of thumb that such costs should be one-third the market price (2900a); or until the first patent office interference between them was finally settled; or until McKeen publicized Pfizer's intention not to issue tetracycline licenses—all of which occurred after their initial November 1953 meetings. Similarly, the jury might have concluded that Bristol entered the conspiracy when the formal agreements between it, Squibb, Upjohn and Pfizer were executed in March 1956, some three months after its meeting with Pfizer in December 1955.

The three basic elements of the conspiracy—price fixing, excluding competitors and misleading the Patent Office—were interrelated. Price fixing could not be effective unless sales of tetracycline were restricted to the parties to the conspiracy; if the drug were sold to every pharmaceutical house that wanted it, the likelihood of price cutting would be greatly increased. Without a patent, however, there was no way to restrict the number of sellers in the market, and the result of broad access to the market—that "any Tom, Dick and Harry with a little bit of money could get in the busines" (3700a)—could have been the same kind of vigorous price competition and low profit margins that had characterized the sale of penicillin (see, *e.g.*, 3686a, 3096a–3097a). Pfizer, Cyanamid and Bristol thus each had a strong motive to insure that access to the market and price competition be limited, and that there be a valid patent that would insure those limitations.

3. Contrary to respondents' assertion that the jury had no standard by which to judge the claim that they had "unreasonably high" prices, the district court carefully explained (4994a–4995a) that this term, with respect to prices,

> is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.
>
> To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the

issue whether the prices involved exhibit qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than competition.

The evidence in this case gave the jury a sound basis for determining under this standard whether the respondents' prices were unreasonably high. The president of Bristol testified (2900a) that there was a "rule of thumb in the pharmaceutical business" that "the best you can do" on prices "is four times your factory cost and that gives you enough money for research, to promote, hire salesmen, take care of general overhead, depreciation and all those things," and that "below three for one, it is just a rule of thumb, you cannot find enough funds to promote effectively and research effectively * * *." The ratio between respondents' factory costs and their selling prices of tetracycline, however, ranged from 6 to 1 to 19 to 1 (compare GX 930, 10324a with GX 934, 10325a).

4. Respondents' argument that the instructions unduly emphasized the "inflammatory" patent issue largely reflects their erroneous contention that the evidence that Pfizer and Cyanamid each misled the Patent Office was irrelevant to the conspiracy issues in this case. But the tetracycline patent was the keystone in creating the restricted structure of the industry which permitted price agreement and upon which respondents rely to justify price inflexibility. Thus the manner in which the patent was obtained was an essential element in the conspiracy charged.

Since the issue was relevant, it required detailed explanation if the jury was to understand the complicated evidence. The trial judge meticulously gave

such explanation. The fact that Pfizer and Cyanamid were not charged with having conspired to defraud the Patent Office did not make the evidence irrelevant. The question was whether, in order to obtain a product patent on tetracycline which could be used to exclude others from manufacturing and selling it, and to establish the condition for maintaining price uniformity, each separately misled the Examiner. That they may have been adversaries in other aspects of the proceedings (such as Cyanamid's attempt to obtain a process patent on an alternative method of manufacturing tetracycline) was not controlling on the issue of their conduct with respect to the product patent on tetracycline.

Although superficially it may appear anomalous for Cyanamid to have aided Pfizer in obtaining the patent as to which it conceded priority when the grant of the patent immediately would require Cyanamid to begin paying royalties, Mr. Edelblute, a Cyanamid patent lawyer who was in charge of Cyanamid's tetracycline patent application before the Patent Office (3588a), explained (3700a) that the "advantage to Cyanamid in Pfizer getting a patent" was that:

> We wouldn't have people like Bristol in the market for one, we wouldn't have the Italians importing it over here for another, and, of course, anybody—with no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business.

The jury, on the evidence before it, was justified in concluding, as the Federal Trade Commission did on a separate record, that the withholding of informa-

tion from the Patent Office by Pfizer and Cyanamid "together with the cross-licensing agreement constituted an illegal attempt by Pfizer and Cyanamid to share in an unlawful monopoly which in the light of the subsequent exploitation of the tetracycline patent resulted in a combination in restraint of trade * * *." *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574, 579 (C.A. 6), certiorari denied, 394 U.S. 920.

5. Respondents Cyanamid and Pfizer contend (Cyanamid Br. 7–11, Pfizer Br. 79–81) that they were denied a fair trial because of prejudicial publicity relating to high prices and profits in the drug industry. The district court fully reviewed this contention in its post-trial opinion (6449a–6453a; 281 F. Supp. 837, 840–842), and correctly rejected it. The court of appeals did not pass on the issue.

The question of possible prejudicial publicity was first raised at a pre-trial hearing in September, 1967, more than six years after the indictment was returned (1000a–1005a). The court there told the respondents that if they had "any doubt that you are going to get a fair trial" (1001a), they should "present any claims on that score in the form of an appropriate motion" (1002a), such as one "for adjournment or for a change of venue, or something like that" (1004a). The respondents made no such motion. It was only after all the evidence was in and both sides had rested that the respondents moved to dismiss the indictment, on the ground that unfavorable publicity had created an atmosphere in which a fair trial was not possible (5502a, 4924a). The court properly denied (4620a–4623a, 4926a) what it later described as an "eleventh

hour * * * final termination of the case in their favor" (6450a; 281 F. Supp. 837, 840).

The trial court took careful steps to assure that the jury was not improperly influenced. During the selection of the jury the district court asked a series of questions designed to bring to light any possible grounds of disqualification: whether the prospective jurors had any feelings for or against the defendant and co-conspirator companies or drug manufacturers generally (1392a–1393a), or had any views about the pricing of drugs or the practices of drug companies that might possibly lead to some bias concerning drug companies (1395a). The court inquired whether they had heard anything about this particular case or the drug industry generally that might influence them (1402a–1405a); and asked whether anything in their background would make it difficult for them to perform their function impartially (1407a). Several prospective jurors whose views about drug companies or drug prices might have influenced them were excused (see 1378a, 1395a–1396a, 1410a, 1417a, 1447a, 1454a, 1460a; 6449a, 6450a, 281 F. Supp. 837, 840). As the district court later noted, the jury panel was "subject to scrutiny by all concerned, including defense counsel, who submitted extensive voir dire requests and participated with characteristic intensity in the screening process" (6452a, 281 F. Supp. 837, 841).

After the jurors were sworn, the court expressly instructed them to refrain from reading or listening to reports of the case from any source (1430a, 1462a).

Immediately before charging the jury, the court, at respondents' request and over the government's ob-

jection, asked the jury whether any of them had heard or seen anything that "might possibly influence you or impair your ability to confine your thinking exclusively to the evidence in the case when you deliberate" (4940a). No juror indicated that he had. The court then reminded the jurors of their assurance that no outside influences before or during the trial would affect their deliberations, "as they must not" (*ibid.*), and similarly so admonished the jury in its final instructions (4943a).

There is thus no basis for respondents' contention that there was prejudicial publicity that may have affected the verdict.

For the foregoing reasons and those given in our main brief, the judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972